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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

No.------

MICHAEL BATTAGLIA,
Appellant-Petitioner,

against

COUNTY OF SCHENECTADY,
Appellee-Respondent.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does petitioner have a Federal Civil Rights cause of action which may be maintained against respondent, County of Schenectady, for 27 months of imprisonment wrongly served?

2. Does petitioner have a pendente state cause of action for false imprisonment which may be maintained against respondent, County of Schenectady, for 27 months of imprisonment wrongly served?

3. Is the Office of State Prosecutor in the State of Ohio the equivalent of the Office of District Attorney in the State of New York, effectively resulting in Pembauer v. City of Cincinnati, 475 U.S. 469, now controlling the issues in this action, thereby effectively overruling the prior Decision of the United States Court of Appeals for the Second Circuit in Baez v. Hennessy, 853 F.2d 73?

4. Do the prior holdings of this court which disapprove of the concept of derivative immunity which flows from an individual to a municipality,

effectively bar such contention by respondent, County of Schenectady?

5. Does the holding of Owen v. City of Independence, 445 U.S. 622, entitle petitioner to maintain both causes of action pled in his Complaint?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose Judgment is sought to be reviewed are Michael Battaglia, as plaintiff, and County of Schenectady, (New York), as defendant. Said plaintiff and defendant were the original parties to the proceeding when it was commenced, and there have been no parties either added to or deleted from the proceeding from the date of its commencement.

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CITATIONS TO OPINIONS BELOW

The opinions of the United State District Court for the Northern District of New York, and the United States Court of Appeals for the Second Circuit on the direct appeal are believed not to have been reported in the Federal Reporter Service, but are included in the Appendix to this Petition for a Writ of Certiorari.

JURISDICTION

This Petition for a Writ of Certiorari seeks to have permission granted to appeal to this court from the final Judgment and Orders entered in the courts below which dismissed the plaintiff's Complaint. The jurisdiction upon which this Petition is filed is made pursuant to 28 U.S.C. 1254(1),

28 U.S.C. 2106 and Rules 10(1)(a)&(c), 12, 13 and 14 of this court. This proceeding seeks appellate review of various Federal and State constitutional and statutory questions affecting a citizen's rights under the V, VI and XIV Amendments in the maintaining of a civil action for a deprivation of constitutional rights pursuant to 42 U.S.C. 1983; whether the Decision of the United States Court of Appeals for the Second Circuit [incorporating Baez v. Hennessy, 853 F.2d 73] is in direct conflict with the Decision of this court in Pembauer v. City of Cincinnati, 475 U.S. 469; whether the role of a prosecutor in the State of New York as decided by the courts below is in inherent conflict with the interpretation of that role as made by the New York

Court of Appeals - a State Court of last resort - in Fisher v. State of New York, 10 NY2d 60, same being required to be followed pursuant to Erie Railroad Co. v. Tompkins, 304 U.S. 64; whether the Complaint of plaintiff pled a viable cause of action for a deprivation of civil rights [whether classified as a Bivens or a 42 U.S.C. 1983 cause of action] pursuant to the Decision of this court in Gomez v. Toledo, 446 U.S. 635; whether the Decisions of this court in Harlow v. Fitzgerald, 457 U.S. 802, Howlett o/b/o Howlett v. Rose, 110 S.Ct. 2430, Brandon v. Holt, 469 U.S. 471, Butz v. Economou, 348 U.S. 478 and Owen v. City of Independence, 445 U.S. 622 effectively do decide, in petitioner's favor, the non-applicability of derivative immunity, thereby providing

no defense in this action to defendant, County of Schenectady; and whether it was proper to dismiss, via Summary Judgment, not only the Federal cause of action of plaintiff, but also, the pendente State cause of action for false imprisonment.

The United States Court of Appeals for the Second Circuit and the United States District Court for the Northern District of New York have decided issues in this proceeding which are in inherent conflict with the Decisions of this court and the New York Court of Appeals - a State Court of last resort, and as a matter of judicial discretion, appellate review is sought to resolve these conflicts. This Petition is being timely filed with this court in that 90 days have not elapsed after the entry of the Order of the United States Court

of Appeals for the Second Circuit on March 24, 1994, affirming the Judgment of the District Court. The Memorandum Decision & Order of the District Court was dated September 28, 1993, and was filed on September 29, 1993. The Judgment of the District Court incorporating the written Memorandum Decision and Order was dated and entered on September 30, 1993. A timely appeal was taken from the District Court to the United States Court of Appeals for the Second Circuit, through the filing of a Notice of Appeal within 30 days thereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

The V Amendment to the United States Constitution guarantees to a

citizen that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The VI Amendment to the United States Constitution guarantees to a citizen that "In all criminal prosecutions, the accused shall enjoy the right to a speedy

and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The XIV Amendment to the United States Constitution guarantees to a citizen that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Statutes

A civil cause of action exists for the deprivation of constitutional rights pursuant to an Act of Congress in 1871. That statute is 42 U.S.C. 1983, which states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

State Statutes

The procedure by which a criminal trial is conducted in the State of New York is administered through the Criminal Procedure Law. Section 30.30(1)(a) of the Criminal Procedure Law states as follows: "Except as otherwise provided in Subdivision 3, a motion made pursuant to paragraph (e) of Subdivision 1 of Section 170.30 or paragraph (g) of subdivision 1 of Section 210.20 must be granted where the people are not ready for trial within: six months of the commencement of a criminal action

wherein a defendant is accused of one or more offenses, at least one of which is a felony...."

The Public Officer's Law in the State of New York defines both a State officer and a Local officer and their respective position in either an elected or appointed capacity. Section 2 of the Public Officer's Law of the State of New York states as follows: "The term 'state officer' includes every officer for whom all of the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer, appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation

to any political subdivision of the state, except United States senators, members of congress, and electors for president and vice-president of the United States. The term 'local officer' includes every other officer who was elected by the electors of a portion only of the state, every officer of a political subdivision or municipal corporation of the state, and every officer limited in the execution of his official functions to a portion only of the state. The office of a state officer is a state office. The office of a local officer is a local office."

The election of a District Attorney and the powers possessed by an individual elected to that office are set forth in the County Law.

Section 400(1-a) of the County Law states as follows: "District attorneys in counties outside of New York city. The term of office of the district attorney of each county outside of New York city shall be for four years commencing on the first day of January following the general election for district attorney in each respective county."

Section 700 of the County Law states as follows: "It shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed; except when the place of trial of an indictment is changed from one county to another, it shall be the duty of the district

attorney of the county where the indictment was found to conduct the trial of the indictment so removed, and it shall be the duty of the district attorney of the county to which such trial is changed to assist in such trial upon the request of the district attorney of the county where the indictment was found. He shall perform such additional and related duties as may be prescribed by law and directed by the board of supervisors."

The appointing of Assistant District Attorneys is governed and controlled by Section 702 of the County Law, it stating, the following: "The board of supervisors shall have the power to authorize the district attorney to appoint cne or more assistant district attorneys. Every such appointment shall

be in a writing filed and recorded in the office of the county clerk. The person appointed shall take the prescribed oath of office and furnish any required official undertaking. Any appointment may be revoked at any time by the district attorney by filing a written revocation in the office of the county clerk."

In deciding Pembauer v. City of Cincinnati, 475 U.S. 469, this court had before it the role of a County prosecuting attorney in the State of Ohio. Through a review of Ohio Revised Code §309.01 et seq, the election, term of office and qualifications of a District Attorney are very similar to those of New York State, as cited above.

STATEMENT OF THE CASE

This action is one brought by the plaintiff, alleging a civil cause of action against the defendant, County of Schenectady, for a deprivation of constitutional rights guaranteed to him by the United States Constitution, the decisional law made by the courts of the United States and New York State, and various New York State statutes, by which he was brought to trial, over objection of his attorney, on a felony grade crime, upon an accusatory instrument which was time-barred, and by which he was convicted, sentenced and imprisoned for a period of time totalling to 2 1/3 years, until released on parole. The convictions entered in the County Court of Schenectady County were all reversed

during November, 1992, by an intermediate Appellate Court, it being the New York Supreme Court, Appellate Division, Third Department. The reversal of the Judgments of Conviction were premised upon the fact that the accusatory instrument was in fact time-barred, the prosecution therefor as conducted by the Office of the District Attorney of Schenectady County having failed to announce their readiness for trial within six months of the date of the commencement of the action as required by CPL 30.30(1)(a). At the time of that reversal, petitioner had served his minimum period of incarceration of 2 1/3 years - or approximately 27+ months. In ruling as it did, the intermediate Appellate Court held that the time-bar required a reversal of all

convictions and a dismissal of the underlying Indictment. At that juncture, petitioner was an individual who had served a lengthy sentence in State Prison all for naught. There was no longer any viable accusatory instrument, any viable charges, and no justifiable basis to support the 27+ months of imprisonment. During that 27 months of imprisonment, petitioner was deprived of his liberty and property interests guaranteed to him by the V & XIV Amendments to the United States Constitution. He also alleged that a failure to afford to him his State statutory Speedy Trial rights in a criminal prosecution also deprived him of his rights under the VI Amendment to the United States Constitution.

In attempting to seek redress for the 27+ months of imprisonment wrongfully served, this action was commenced by petitioner premised upon the commission of tortious conduct which violated fundamental constitutional rights. The petitioner was brought to trial on a time-barred accusatory instrument. Because the accusatory instrument was time-barred, everything which necessarily flowed therefrom was invalid. As a result of being prosecuted on an invalid accusatory instrument, he was deprived of his liberty and property. The deprivation of his liberty and property was most certainly without due process of law, for absent the existence of a viable accusatory instrument, it cannot be said that due process existed. The deprivation of his rights

and the denial of his liberty and property was quite extreme. He was locked in a State Prison facility for 27+ months. He was denied freedom of movement, an ability to earn income, and for all intent and purposes subjected to treatment consistent with that of a "caged animal" for 27+ months. He most certainly was denied an equal protection of the law, for if properly applied, there should have been no prosecution on an invalid accusatory instrument. He most certainly was denied his constitutional right to a Speedy Trial as guaranteed to him by New York State statute and the corresponding provisions of the VI Amendment to the United States Constitution. That, of course, is not even arguable, for the collateral estoppel bar existed

on the Speedy Trial Time Limitation issue, when the District Attorney of Schenectady County refused to further challenge the ruling of the intermediate Appellate Court.

In order to seek redress for those wrongs/constitutional deprivations committed, petitioner commenced an action containing two causes of action, the first being for the deprivation of constitutional rights; and the second being for false imprisonment. There was no formal discovery which was believed necessary by counsel. After an initial conference before the United States Magistrate, the case was referred to the Chief United States District Judge assigned to the action, for the purpose of defendant-appellee making its motion for Summary Judgment.

It was contended by defendant-appellee that the District Attorney of Schenectady County and his Assistant District Attorneys **were not** County officers, and therefore, the County could not be liable for any alleged wrongs which its District Attorney and his Assistants may have committed, great reliance therefor being placed upon the Decision of the United States Court of Appeals for the Second Circuit in Baez v. Hennessy, 853 F.2d 73. It was contended that a District Attorney empowered by County Law, required to be a County resident, elected by only the populace of one County, limited in his/her geographical prosecution to County boundaries (with certain exceptions), and having his/her office funded by a budget presented to the

County Board of Supervisors was, quite remarkably, a State office rather than a County office, and therefore, the County had no liability for wrongs allegedly committed. It was contended by petitioner in the courts below that the ruling of the United States Court of Appeals for the Second Circuit in Baez v. Hennessy, 853 F.2d 73, was outdated, and no longer controlling, given the holding of this court in Pembauer v. City of Cincinnati, 475 U.S. 469. It was contended that the roles of both a County District Attorney in New York State and a County prosecuting attorney in the State of Ohio were similiar, if not identical. In Pembauer, liability against the municipality for the acts of the prosecuting attorney was upheld. There is presented for review in this

court on the issue of irreconcilable conflict, whether the holding of this court in Pembauer now effectively overrules the holding in Baez.

The defendant-appellee also raised issues of immunity flowing from the Office of the District Attorney to itself, contending that if a District Attorney in any County had prosecutorial immunity and could not be held liable personally, for his or her acts, then the County also had such immunity, through an application of it passing to itself under a concept of derivative immunity. It was contended by petitioner in the courts that no such application was proper, for this court prospectively disapproved of same in recent holdings on issues of immunity. It is requested that the Petition for

a Writ of Certiorari be granted so as to address the propriety and correctness of the issue of derivative immunity.

The defendant-appellee also asserted a claim that the Federal cause of action pled in the Complaint of petitioner did not contain the required pleading elements, it being asserted that same could not be maintained pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388; and that same was likewise precluded by the respondeat superior defense decided in Monell v. New York City Dep't of Social Servs., 436 U.S. 658. It is asserted herein, as was alleged in the court below, that initial reliance on Bivens was in fact misplaced. Notwithstanding same, the issue presented for review is whether

the Federal cause of action pled by plaintiff in his Complaint does in fact satisfy the holding of this court in Gomez v. Toledo, 446 U.S. 653 @ 639. The petitioner contends that his first cause of action does in fact meet that pleading requirement test, and that if correct on the above-stated issues relating to the municipality for which a District Attorney is employed and derivative immunity, that the dismissal of the first cause of action pled in his Complaint was improper. It is also contended that the dismissal of the second cause of action contained in the Complaint [alleging a pendent State claim for false imprisonment] was also improperly dismissed.

This proceeding involves a review of the Judgment of a Federal Court as affirmed on appeal. The basis for Federal jurisdiction is that one of the causes of action asserted by petitioner arises under a Federal statute. Jurisdiction for the Federal Court to hear this action is authorized pursuant to 28 U.S.C. 1343, which grants to District Courts original jurisdiction of any civil action authorized to be commenced by any person because of the deprivation of any right or privilege of a citizen of the United States. Jurisdiction for this proceeding to be reviewed by this court by a Petition for Writ of Certiorari is authorized pursuant to 28 U.S.C. 1254(1) & 28 U.S.C. 2106.

ARGUMENT

POINT #1

PETITIONER DOES HAVE A FEDERAL CIVIL RIGHTS CAUSE OF ACTION WHICH MAY BE MAINTAINED AGAINST RESPONDENT, COUNTY OF SCHENECTADY, FOR 27 MONTHS OF IMPRISONMENT WRONGLY SERVED.

There exists no question that petitioner improperly served 27 months of imprisonment, 20+ months of which were in a State Prison facility. As a result of Appellate Court corrective action, all convictions were reversed and the accusatory instrument/Indictment dismissed. A time-bar was found to exist, which such determination went unchallenged and became final and binding. The petitioner was denied his liberty and freedomon of movement, was wrongly incarcerated, was denied his right to a Speedy Trial, was incarcerated on a void/time-barred

accusatory instrument [leading to a finding of an absence of due process of law], and may have been denied an equal protection of the laws when a Speedy Trial Time Limitation motion was twice denied. In view of those facts, what cause or causes of action did petitioner have? The petitioner initially contended that his rights to seek redress were pursuant to the holding of this court in Bivens. After further review and reflection, on appeal, that initial position taken was modified, it being agreed that a Bivens cause of action was not applicable [for Federal officers were not involved], but instead, the rights of petitioner were protected by a 42 U.S.C. 1983 claim. At oral argument in the District Court, state-ments were made relating to what could

be proved and not proved on issues of policy, custom and usage in the context of a 42 U.S.C. 1983 cause of action, but those assertions made at oral argument on the Summary Judgment motion were not correct. When one examines the Decision of this court in Pembauer v. City of Cincinnati, it is quite clear that a County prosecutor could be found to have been acting as a final decisionmaker for a County. When a high level elected individual acts in that capacity, Pembauer instructs us that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances....Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action

ordered....The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of State law.... Applying this standard to the case before us, we have little difficulty concluding that the Court of Appeals erred in dismissing petitioner's claim against the County. The Deputy Sheriffs who attempted to serve the capiases at petitioner's clinic found themselves in a difficult situation. Unsure of the proper course of action to

follow, they sought instructions from their supervisors. The instructions they received were to follow the orders of the County Prosecutor. The Prosecutor made a considered decision based upon his understanding of the law and commanded the officers to forcibly enter petitioner's clinic. That decision directly caused the violation of petitioner's IV Amendment rights."

In comparing the role of a County Prosecutor in the State of Ohio, as was present before this court in Pembauer versus the role of a County District Attorney in the State of New York, as is present in this case, the following is noted: In the State of Ohio, individuals are prosecuted under the title of State of Ohio, as plaintiffs. In the State of New York,

individuals are prosecuted under the title The People of the State of New York, as plaintiffs. The funding for a County Prosecutor in the State of Ohio is by County budget, as is present in the State of New York. An individual must be a resident of the County to be a County Prosecutor in the State of Ohio. That same rule applies in the State of New York. The individual so elected in each State serves by vote of the populace of only the County. They are both elected for a four year term. They both are limited in their geographic boundaries by County lines, unless venue in a criminal action is changed. They each are the highest ranking criminal law policymaker in their respective counties. They are, by their own legislative enactments, local officers

who are authorized to act in a specific county. In Pembauer, the proscribed conduct was to order the Deputies to enter the doctor's office forcefully in violation fo the IV Amendment. In this instance, it was the ordering or directing of a Chief Assistant District Attorney to prosecute petitioner to all ends, so as to obtain a conviction on an accusatory instrument later found to be time-barred, resulting in imprisonment unjustly served, and then, even when an application was made for release on bail pending appeal, that was twice opposed by that office, which was ultimately denied. It is respectfully submitted that a Decision of this court in Pembauer is equally applicable to this case, and if County liability was imposed in Pembauer, it should also be able to

be imposed in this case, upon appropriate trial proof being shown.

When one examines the Complaint of petitioner and compares same to the pleading requirements of a 42 U.S.C. 1983 cause of action as pronounced in Gomez v. Toledo, 446 U.S. 635 at 639, it is submitted that the first cause of action contained in the Complaint of petitioner does in fact meet the requisite test which states a viable cause of action. Petitioner in this case did in fact allege that some person deprived him of a Federal right, and that the person who so deprived him of that right was a County employee, i.e., acting under color of state or territorial law.

It is respectfully submitted that the dismissal of the Complaint of

petitioner both in the Trial Court and on appeal, was in error, that this Petition for a Writ of Certiorari should be granted, that the Judgment entered in the Trial Court should be vacated, and that this action remitted to the Trial Court for trial on the causes of action pled therein.

POINT #2

THE PENDENT STATE CAUSE OF ACTION FOR FALSE IMPRISONMENT PLED IN THE COMPLAINT OF PETITIONER WAS IMPROPERLY DISMISSED.

The Complaint of petitioner asserted a Federal cause of action for deprivation of constitutional rights and a pendent state cause of action for false imprisonment. In addressing the motion of defendant for Summary Judgment, neither of the courts below discussed, at all, the pendent state claim of petitioner. Both the Decision of the Trial Court and the Decision of the Second Circuit concentrated exclusively on the Federal civil rights cause of action. In ruling as they did, the courts below dismissed the pendent state claim sub silento. In doing so a Judgment has now been entered

which dismisses that cause of action and creates a res judicata bar from maintaining or continuing with the prosecution of that cause of action whether same be in the Federal Courts or in the State Courts. That, it is submitted, was improper.

The rulings made in the courts below never addressed the merits of the pendent state claim. It would appear on its face that the pendent state claim was never decided "on the merits". Although a Federal Court has discretion to dismiss a pendent state claim without reaching its merits, when not properly commented upon, a res judicata bar is met head on. In reviewing 28 U.S.C. 1367, it would appear that judicial discretion was not properly exercised in declining to continue exercising juris-

diction over the pendent state claim, or at least making note that the determination made was based upon matter not affecting the merits of the claim so as to trigger a res judicata bar.

It is respectfully submitted that the Petition for Writ of Certiorari should be granted to determine the continued viability of the pendent state claim and whether same should be heard in the Federal Courts, or alternatively, in the State Courts upon a finding that the merits of same were never addressed in the ensuing dismissal.

POINT #3

THE OFFICE OF STATE PROSECUTOR IN THE STATE OF OHIO IS THE EQUIVALENT OF THE OFFICE OF DISTRICT ATTORNEY IN THE STATE OF NEW YORK, EFFECTIVELY RESULTING IN PEMBAUER NOW CONTROLLING THE ISSUES IN THIS ACTION, THEREBY EFFECTIVELY OVERRULING THE PRIOR DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN BAEZ.

The office of County Prosecutor in the State of Ohio is the equivalent of the office of County District Attorney in the State of New York. In Point #1 of this Petition, the similarities of both of those offices are reviewed. There appears to be little, if any distinction between the two offices. In Pembauer, it was held that the County Prosecutor was acting as the final decisionmaker for the County, and therefore, the County may therefore be held liable under 42 U.S.C. 1983. In

this instance, two different District Attorneys and a number of Assistant District Attorneys all acted toward one common end, same being to prosecute petitioner, hopefully obtain convictions, and upon those convictions have the court impose a maximum-type of sentence. That is precisely what transpired. In fact, the District Attorney and Assistant District Attorneys in this case went one step farther. When petitioner sought the release on bail pending appeal on two separate occasions, such requested relief was opposed, and upon being opposed, was denied. As a result thereof, 27+ months of incarceration was unjustly served. Is the County of Schenectady liable therefor? It is respectfully submitted that they are.

There existed one obstacle to such a determination being made, same being the Decision of the United States Court of Appeals for the Second Circuit in Baez v. Hennessy, 853 F.2d 73, holding that a District Attorney of any county was a State officer rather than a County officer, and as such, the County could not be liable for the acts committed by the elected official occupying that position. It is believed that once one examines New York Court of Appeals and Appellate Division, Third Department decisional law, this court's Decision in Pembauer, the statutes upon which the District Attorney in the State of New York acts or is empowered, together with the argument contained herein, that the ruling in Baez v. Hennessy should now be disapproved and overruled.

It is contended in this litigation that the two elected District Attorneys and the numerous Assistant District Attorneys who prosecuted petitioner on the time-barred accusatory instrument which resuled in 27 months of incarceration wrongly served, are in fact the agents, servants and employees of the County of Schenectady, New York. In that regard, the following is noted:

> A District Attorney is elected in each of the 62 counties of New York State, by the electorate **of only that county.** A District Attorney is required to be a resident of that specific county to which he or she is elected. Once elected it is that specific county itself that funds the office of District Attorney. Based upon the amount of funding,

Assistant District Attorneys are appointed, investigators hired, office staff hired, and other expenses paid. If there is a financial shortfall during any specific year, the District Attorney returns to the **County government** for additional funding. The employees in that office are considered to be County employees. They are believed to receive County pay-checks and County employment benefits.

A review of Public Officer's Law §2, clearly shows that the position of a District Attorney is that of a "local officer" rather than a State officer. Most certainly, District Attorney Poersch, District Attorney Carney, Assistant District Attorney Mueller, Assistant District Attorney Chapleau, and Assistant DIstrict Attorney

Greene [those actually involved in all aspects of petitioner's prosecution] were and are employees of the County of Schenectady, New York.

A review of Public Officer's Law §2, clearly shows that the position of a District Attorney is that of a "local officer" rather than a State officer. The term "local officer" includes those officers who are elected by the electors of a portion only of the State, a political subdivision, or a municipal corporation. The office of a local officer is a local office. Most certainly the District Attorney elected only in his/her County falls within the four corners of the "local officer" definition.

Through a review of County Law §400(1-a), the term of

a District Attorney within the State of New York is fixed at four years. Through a review of County Law §700, the duties and powers of a District Attorney are set forth. Through a review of County Law §702, a procedure is provided for the District Attorney being authorized by the County Board of Supervisors to appoint one or more Assistant District Attorneys. It is important to note that such laws are compiled under the title known as the **"County Law"**.

In Fisher v. State of New York, 10 NY2d 60, the New York Court of Appeals clearly held that **it was not** the State which was the employer of an Assistant District Attorney. It was held that an Assistant District Attorney of a County was in

fact a "local officer" as defined by Public Officer's Law §2, who was elected by the voters of a part of the State, and performed his or her duties within a certain designated political subdivision or municipal corporation, to wit: a specificially designated County.

> "To call an Assistant District Attorney a State officer would be impossible under the terms of that statute...."

In Whitmore v. State of New York, 55 AD2d 745, Third Dept., that same rationale of the Court of Appeals as set forth in Fisher was again adopted in absolving the State of New York from claims of false arrest, false imprisonment and malicious prosecution premised upon

> acts of individuals within the office of the District Attorney of Kings County.
>
> That issue as decided by the highest court in New York State in Fisher, was one involving issues of state substantative common law, providing an interpretion of the statutes of New York State, believed to require same to be accepted pursuant to the holding of Erie Railroad Co. v. Tompkins, 304 U.S. 64.

With those general principles now in place, one must analyze the prior Decision of the Court of Appeals for the Second Circuit in Baez v. Hennessy, which counsel for defendant-appellee and the courts below have so heavily relied on in dismissing the Complaint of petitioner. While a lengthy discussion is provided about

the role of a District Attorney and who employs that individual, it is quite clear that it is impossible to reconcile Baez with Fisher and Whitmore. Both cases reached different conclusions. Most certainly, an interpretation of the status of a District Attorney within the State of New York is a matter of State substantative law, **not Federal law**, and the holding of Erie Railroad Co., should control. It does now appear and is submitted to this court that the status of a District Attorney is that of a local County official, for which municipal liability, not personal liability can be imposed. It is believed that Baez is no longer controlling, has been overruled by Pembauer, must fall by the wayside when all of the above-stated factors

are considered, and should now be disapproved at this time. A failure to do so by the courts below constitute reversible error. If the highest court in the State of New York states that a District Attorney **is not** a State officer, then something is awry if the Federal Appeals Court states that he is. Most certainly he cannot be both.

When examined in light of Pembauer, Fisher, Erie Railroad Co., Whitmore and the statutes above referred to, it is submitted that the holding in Baez should be disapproved and no longer followed. It is respectfully submitted that this Petition requesting a Writ of Certiorari on this issue should be granted; the Orders made in the court below adopting Baez, reversed; the dismissal of the Complaint

of petitioner, vacated; and this action remanded to the Trial Court for further proceedings not inconsistent therewith.

POINT #4

THE PRIOR HOLDINGS OF THIS COURT WHICH DISAPPROVED OF THE CONCEPT OF DERIVATIVE IMMUNITY WHICH FLOWS FROM AN INDIVIDUAL TO A MUNICIPALITY, EFFECTIVELY BARS SUCH CONTENTION BY RESPONDENT, COUNTY OF SCHENECTADY.

It has been argued by defendant-appellee in both courts below that it "somehow" derives prosecutorial immunity which would insulate the District Attorney and the Assistant District Attorneys from tort liability. It is petitioner's position that such legal concept of derivative immunity is not correct.

In Harlow v. Fitzgerald, 457 U.S. 802, this court addressed issues of absolute immunity and qualified good faith immunity, together with an application of a functional approach therefor. What was present in that case was a

civil action predicated upon Bivens, alleging a constitutional tort arising under the First Amendment to the United States Constitution. In referring to this court's previous Decision in Butz v. Economou, 348 U.S. 478, claims of derivative immunity were rejected. It does appear in this case that that is precisely what defendant-appellee requests, that the prosecutorial immunity flowing to the District Attorney now benefits itself. The claim made by defendant-appellee in this case is that of derivative immunity, which has now been disapproved. If a claim of derivative immunity was rejected in Butz and commented upon in Harlow as not being able to be reconciled within the functional approach of immunity, it certainly is not applicable in this

civil action. It is respectfully submitted that no derivative liability runs to or in favor of deefndant-appellee.

In Brandon v. Holt, 469 U.S. 471, this court reversed the Court of Appeals for the Sixth Circuit when that court had applied a shield of qualified immunity to a municipality in a 42 U.S.C. 1983 action. It was held that such a shield of qualified immunty, as applied, was improper. If in fact it was found to be improper in Brandon, it likewise is submitted to this court that it would be improper to provide this defendant-appellee with the prosecutorial immunities which personally benefit the District Attorneys and the Assistant District Attorneys who violated the constitutional rights of

petitioner and imprisoned him for 27 months on a time-barred accusatory instrument.

In Pembauer v. City of Cincinnati, this court held that municipal liability could be imposed against the County notwithstanding the shield of prosecutorial immunity protecting the prosecutor.

In Howlett o/b/o Howlett v. Rose, 110 S.Ct. 2430, this court held that a state could be joined in an action for a violation of established State common law or statutory duties, that it was subject to suits for violations of its non-discretionary duty not to violate the Constitution; and that individual states may not exempt persons from Federal liability by relying on their own common law heritage.

The "blanket" immunity so strenuously argued for by defendant-appellee through its attorneys as may at one time have been supported by Baez, is no longer the law applicable to this case. For such reasons, it is submitted that error was committed in the courts below when Summary Judgment was granted in favor of defendant-appellee and the Complaint of petitioner dismissed. The petitioner respectfully requests that such rulings made in the court below be reversed or vacated so that apparent conflict as now exists can be corrected.

POINT #5

THE HOLDING OF THIS COURT IN OWEN V. CITY OF INDEPENDENCE ENTITLES PETITIONER TO MAINTAIN BOTH CAUSES OF ACTION PLED IN HIS COMPLAINT.

In 1980, this court announced its Decision in Owen v. City of Independence, 445 U.S. 622. In that Decision, the law relating to municipal liability as may once have existed, was radically changed. In that case, plaintiff had asserted a XIV Amendment - denial of due process claim against the City of Independence, Missouri and its council members. Although the District Court held that plaintiff could assert such a claim against the municipality, the Court of Appeals reversed, holding that all of the defendants, including the City were entitled to qualified immunity from liability based upon the good faith of

the City officials involved. That claim of immunity flowing to or benefiting the municipality as found by the Court of Appeals, was reversed by this court, as having been improperly decided.

In determining that the municipality derived no immunity from liability, by reason of the acts of its officers and employees, the court discussed many issues at length, some of which are most important in this civil litigation, as follows:

> "There is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action. A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or a branch of its government,

empowered to act for it upon the subject to which the particular act relates...."

"The central aim of the Civil Rights Act [in this instance, protections afforded to citizens by the United States Constitution] was to provide to those persons wronged by the misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of State law.....By creating an express Federal remedy, Congress sought to 'enforce provisions of the XIV Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'"

"How 'uniquely amiss' it would be, therefore, if the government itself - 'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' - were permitted to disavow liability for the injury it has begotten....A damages remedy against the offending party is a vital component

of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most governmental officials....many victims of municipal malfeasance would be left remediless if the City were also allowed to assert a good-faith defense. Unless contravailing considerations counsel otherwise, the injustice of such a result should not be tolerated."

"The knowledge that a municipality would be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the City may encourage those in a policy-making position to institute internal rules and programs

designed to minimize the likelihood of unintentional infringements on constitutional rights."

"Our previous decisions conferring qualified immunities on various government officials...., are not to be read as derogating the significance of the societal interest in compensating the innocent victims of governmental misconduct. Rather, in each case we concluded that overriding considerations of public policy nonethless demanded that the official be given a measure of protection from personal liability. The concerns that justify those decisions, however, are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue."

"It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby...."Elemental notions of fairness dictate that one who causes a loss should bear the loss."

"In sum, our decisions holding that municipalities have no immunity from damages lia-

bility flowing from their constitutional violations harmonizes well with the developments in the common law and our own pronouncements on official immunities under §1983. Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss - spreading has joined fault as a factor in distributing the costs of official misconduct."

"We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the §1983 cause of action; the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by the abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts

> himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of the injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those who edicts or acts may fairly be said to represent official policy'...."

In applying the holding of Owen to this case, it is clear that District Attorney Carney, District Attorney Poersch and the Assistant District Attorneys who prosecuted petitioner are afforded prosecutorial immunity protection. The person/entity which is no longer afforded that protection is the municipality, the defendant-appellee, County of Schenectady. There is no question that petitioner was

seriously harmed by reason of the constitutional deprivations committed against him. So long as all of the actors within the Office of the District Attorney of Schenectady County conducted themselves in good faith, they may go about their business secure in the knowledge that the immunity afforded to them under the law will protect them from personal liability.

The petitioner was an individual who was charged with a crime in 1988. By law, he was presumed innocent until proven guilty beyond a reasonable doubt. By reason of his financial circumstances, he was unable to make bail, when arrested. As a result thereof, he languished in jail for a period of time in excess of six months. During that six month time frame, the District

Attorney of Schenectady County did not timely indict him and declare their readiness for trial. When brought to the attention of that District Attorney, the answer which ensued was to hurriedly run to the Grand Jury and obtain an Indictment. On the way, it forgot one thing, same being the right of petitioner to appear and testify on his own behalf. As such, the first Indictment was dismissed. Now, having 10 days to obtain another Indictment, that office waits until the last minute to again present the case to the Grand Jury. Although it obtained its second Indictment, it allegedly "lost track of the whereabouts" of the very person it incarcerated on the prosecution it handled. When that individual was not produced for arraignment within the six

month statutory Speedy Trial Time Limitation period, a motion was made for dismissal. That motion made for a dismissal was improperly decided in the County Court of Schenectady County. Thereafter, on what later was found to be a time-barred accusatory instrument/ Indictment, plaintiff-appellant was prosecuted, convicted and imprisoned for a period of 27+ months. During that time, he attempted to make bail pending appeal, which was opposed by the very District Attorney's Office that conducted the prosecution, causing him to serve his entire minimum period of incarceration before being released on parole.

When the Appellate Court reviewed this entire matter, it reversed the Judgments of Conviction and dis-

missed the accusatory instrument. At that point in time, petitioner had served 27+ months of incarceration, 20+ months of which had been in State Prison facilities. Is not the municipality now liable to him for that imprisonment wrongly served? Does not Owen provide him with redress against that municipality? As stated in Owen, how uniquely amiss it would be for the government itself, this defendant-appellee, the County of Schenectady, the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct, if it were permitted to disavow liability for the injury it has begotten, through its own County officers and employees. The....

"injustice of such a result should not be tolerated".

There exists no question that constitutional torts as well as a State common law tort was committed against petitioner for which he greatly suffered. Should he not be entitled to a recovery therefor against the offending municipality which employed the District Attorneys and the Assistant District Attorneys who caused same to be visited upon him?

It is respectfully submitted that a response to these inquiries should be in the affirmative. In order to accomplish same, this Petition for a Writ of Certiorari should be granted, and the action restored to the trial calendar for discovery, trial and all

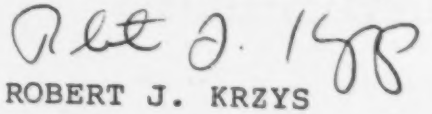
further proceedings. The petitioner requests an opportunity to have his day in court for the wrongs committed against him. It is requested that this court grant same to him.

CONCLUSION

THE PETITION REQUESTING A WRIT OF CERTIORARI SHOULD BE GRANTED; THE MEMORANDUM DECISION & ORDER AND JUDGMENT OF THE DISTRICT COURT AS WAS AFFIRMED ON APPEAL, DISMISSING THE PETITIONER'S COMPLAINT, VACATED; AND THIS PROCEEDING REMANDED TO THE TRIAL CORUT FOR TRIAL OR OTHER DISPOSITION ON THE CLAIMS OF PETITIONER WHICH ALLEGE THE COMMISSION OF CONSTITUTIONAL TORTS AND A COMMON LAW TORT BY DEFENDANT.

Dated: June 21, 1994

Respectfully submitted,



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Telephone (518) 842-3795

Decision and Order Affirming Judgment of District Court

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 24th day of March, One Thousand Nine Hundred and Ninety-four.

PRESENT:

HONORABLE JAMES L. OAKES,

HONORABLE THOMAS J. MESKILL,

HONORABLE FRANK X. ALTIMARI,
Circuit Judges.

MICHAEL BATTAGLIA,

Plaintiff-Appellant,

-v.- 93-9172

COUNTY OF SCHENECTADY, NEW YORK,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of New York.

transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Plaintiff-appellant Michael Battaglia appeals from a judgment entered in the United States District Court for the Northern District of New York (McAvoy, J.), granting Defendant-appellee County of Schenectady's motion for summary judgment and dismissing Battaglia's complaint. On appeal, Battaglia contends that the judgment should be vacated and his complaint should be reinstated because he was deprived of his constitutional rights by the County

of Schenectady's District Attorney. Specifically, Battaglia argues that he can maintain a cause of action against the County of Schenectady pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), or in the alternative, pursuant to 42 U.S.C. § 1983, and that the County of Schenectady is liable for the decisions and actions of its District Attorney.

Battaglia was implicated in the robbery of Joseph's Pharmacy in Albany which occurred March 6, 1988. Shortly after the robbery, the police arrested Battaglia at a nearby gas station where they found drugs and cash taken from the pharmacy in a bag located close to his person. The original indictment dated February 14, 1989 charged Battaglia with

burglary in the third degree, petit larceny, criminal mischief in the fourth degree, and criminal possession of stolen property in the fifth degree. This original indictment was dismissed without prejudice. The County Court of Schenectady County (Reilly, J.) noted that the prosecution had ten days remaining to establish their readiness for trial due to the speedy trial requirements of N.Y. Crim. Proc. L. § 30.30. Battaglia was reindicted and arraignment was scheduled on February 24, 1989. Battaglia could not appear at the indictment because he was serving a sentence in the Saratoga County Jail on an unrelated charge. In Battaglia's absence, the prosecution announced that they were ready for trial. The County Court rescheduled the arraignment for March 3, 1989.

Battaglia subsequently moved to dismiss the indictment pursuant to N.Y. Crim. Proc. L. § 30.30. The County Court denied the motion, finding that defense counsel consented to the adjournment by failing to object and that the arraignment was timely. Thereafter, the case went to trial, resulting in a conviction on all four counts. Battaglia was sentenced to an indeterminate term of imprisonment of 1 1/3 to 7 years, and three separate definite terms of 6 months to run concurrently with the indeterminate term. Battaglia appealed. Battaglia served 2 1/3 years and was released on parole on or about January 2, 1992.

Battaglia's appeal of the County Court's decision was decided on November 12, 1992. The Appellate Division, Third Department reversed the

County Court's decision and dismissed the indictment, holding that the County Court improperly denied Battaglia's motion to dismiss the action.

On February 3, 1993, Battaglia commenced an action in the United States District Court for the Northern District of New York alleging two causes of action against the County of Schenectady: (1) violations of his Fifth, Sixth, and Fourteenth Amendments, and (2) false imprisonment. During oral argument, Battaglia's counsel stated that the suit was brought pursuant to Bivens and not under 42 U.S.C. § 1983. The County of Schenectady moved for summary judgment pursuant to Fed. R. Civ. P. 56(c). In a decision and order filed September 29, 1993, the district court granted the motion and dismissed Battaglia's claim.

Battaglia appealed.

We review an appeal from a grant of summary judgment de novo. See Litton Indus. v. Lehman Bros. Kuhn Loeb, Inc., 967 F.2d 742, 746 (2d Cir. 1992). Fed. R. Civ. P. 56(c) provides that a motion for summary judgment shall be granted only if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Viewing the record in the light most favorable to the nonmoving party, a dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).

Upon review of the record in the light most favorable to Battaglia, we find that there are no genuine issues as

to any material fact. Our review of this motion, therefore, turns on the legal issue of whether Battaglia can maintain an action against a municipality under Bivens or 42 U.S.C. § 1983.

In Bivens, the Supreme Court created a cause of action for individuals whose constitutionally protected rights were invaded by federal agents clothed with federal authority. 403 U.S. at 395; see also FDIC v. Meyer, 62 U.S.L.W. 4138 (1993). Decisions in both the Supreme Court and this Court, however, foreclose this course of action because the County of Schenectady is a state actor, not a federal agent acting under the authority of federal law. See Monell v. Dep't of Social Services, 436 U.S. 657 (1978) (holding that action against local government can be brought directly under 42 U.S.C. § 1983 if constitutional vio-

lation of local officer was pursuant to official policy or custom of local government); Turpin v. Mailet, 591 F.2d 426, 427 (2d Cir. 1979) (holding availability of § 1983 cause of action against municipality precludes any other direct claims against such municipality under Fourteenth Amendment). An action brought against a municipality directly under the Fourteenth Amendment must be brought pursuant to 42 U.S.C. § 1983. See Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 735 (1989) (holding § 1983 cause of action is exclusive remedy against state actors). Therefore, Battaglia's only remedy is to pursue a cause of action under 42 U.S.C. § 1983.

Liability attaches to municipalities when "the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts

or acts may fairly be said to represent official policy, inflicts the injury that the goernment as an entity is responsible under § 1983." Monell, 436 U.S. at 694. In determining whether a particular official has the requisite policy making authority to render a public entity liable under § 1983, we must look to the applicable state law. See City of St. Louis v. Prapotnik, 485 U.S. 112 (1988). In Baez v. Hennessy, this Court reviewed and analyzed the legislative and judicial history of a prosecutor's role in the State of New York and determined that the District Attorney in the State of New York, acting in its prosecutorial role, represents the State and not the County. 853 F.2d 73, 77 (2d cir. 1988) (stating "it would be a violation of the District Attorney's ethical obligations as counsel

for the State in a criminal proceeding to permit himself to be influenced in the performance of his duties by so-called policies of a County."). In the instant case, we find that the District Attorney, in exercising his judgment to prosecute, was acting in accordance with his authority as dictated by New York State Law, not pursuant to any County of Schenectady policies. See Id. Therefore, Battaglia has failed to show a violation of a federally protected right which resulted from the enforcement of the County of Schenectady's custom or policy. Notably, Battaglia conceded in the district court at oral argument that Monell precluded him from establishing municipal liability against the County of Schenectady under § 1983. Accordingly, we find that summary judgment was properly granted in favor

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Accordingly,
Judgment was

of the County of Schenectady.

We have examined Battaglia's remaining arguments and find them to be without merit.

The judgment of the district court is AFFIRMED.

/s/ James L. Oakes
HON. JAMES L. OAKES,

/s/ Thomas J. Meskill
HON. THOMAS J. MESKILL,

/s/ Frank X. Altimari
HON. FRANK X. ALTIMARI,
Circuit Judges.

Memorandum Decision & Order of
District Court Dismissing Complaint

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHAEL BATTAGLIA,

Plaintiff,

-against- 92-CV-1690

COUNTY OF SCHENECTADY,

Defendant.

APPEARANCES:

ROBERT J. KRZYS
107 Division Street
Amsterdam, New York 12010
FOR PLAINTIFF

ROEMER AND FEATHERSTONHAUGH,P.C.
Capital Center, 99 Pine Street
P. O. Box 318
Albany, New York 12201-0318
FOR DEFENDANT

OF COUNSEL:

CLAUDIA A. RYAN, ESQ.
ROSEMARIE RIDDELL, ESQ.

Thomas J. McAvoy, U.S.D.J.,

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant County

of Schenectady has brought before this court a motion for summary judgment on Plaintiff Michael Battaglia's claim that Defendant infringed upon his constitutional rights. At oral argument, Plaintiff conceded that Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 98 S.Ct. 2018 (1978), precluded him from establishing respondeat superior municipal liability against the Defendant under 42 U.S.C. § 1983, but argued that he could pursue a direct action pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971).

It is this Court's determination that Plaintiff's exclusive reliance on Bivens is misplaced, and therefore a Bivens-type action cannot be asserted against a municipality where an alterna-

tive remedy is available. Consequently, this Court must grant Defendant's motion for summary judgment and dismiss Plaintiff's claim in its entirety.

I. FACTS

Plaintiff Michael Battaglia was implicated in the robbery of Joseph's Pharmacy in Albany which occurred on March 6, 1988. The police arrested Mr. Battaglia shortly after the robbery at a near-by gas station where they found drugs and cash taken from the pharmacy in a brown bag located close to the Plaintiff's person.

Plaintiff was charged by criminal complaint with Burglary in the Third Degree, arraigned, and then remanded to jail. Mr. Battaglia sat in jail until the speedy trial time was about to expire. Apparently, the prosecutor indicted

Mr. Battaglia on February 14, 1989, but this original indictment was dismissed by the court. The prosecutor then "re-indicted" Mr. Battaglia on February 22, 1989, but the court held that the prosecution had to be ready to try the case by February 24, 1989, due to the speedy trial requirements. Hence, Mr. Battaglia's arraignment on the second indictment was scheduled for February 24, 1989. Mr. Battaglia, however, could not appear for this arraignment because he was serving a sentence in the Saratoga County Jail on an unrelated charge. In Mr. Battaglia's absence, the People announced that they were ready for trial. The County Court re-scheduled the arraignment for March 3, 1989.

The defense then moved to dismiss the indictment on the ground that

Mr. Battaglia was deprived of his right to a speedy trial pursuant to CPL § 30.30. The County Court denied the motion and conducted the trial. Mr. Battaglia was convicted on four counts (Burglary 3rd, Petit Larceny, Criminal Mischief 4th, and Criminal Possession of Stolen Property 5th). Mr. Battaglia was sentenced to an indeterminate term of imprisonment of 1 1/3 to 7 years, and three separate definite terms of imprisonment of 6 months to run concurrently with the indeterminate term. Mr. Battaglia served 2 1/3 years and was released on parole on or about January 2, 1992.

Mr. Battaglia's appeal of the County Court decision was decided on November 12, 1992. The Appellate Division, Third Department, determined that the County Court improperly denied

Mr. Battaglia's motion to dismiss the action based upon his right to a speedy trial. Consequently, the court reversed the County Court and dismissed the indictment. People v. Battaglia, 187 A.D.2d 808, 589 N.Y.S.2d 694 (3rd Dep't 1992).

On January 5, 1993, Mr. Battaglia filed and served a notice of examination pursuant to Section 50-e of the New York General Municipal Law. In response, Defendant served a notice of examination pursuant to section 50-h of the General Municipal Law. Defendant asserts that Mr. Battaglia failed to comply with this notice.

On February 3, 1993, Mr. Battaglia commenced this action. In his complaint, Mr. Battaglia alleges two causes of action against the Defendant. The first alleges violations of his Fifth, Sixth,

and Fourteenth Amendments. The second alleges a claim for false imprisonment. During oral argument, counsel for Mr. Battaglia explicitly stated that the suit was brought pursuant to Bivens and not under 42 U.S.C. § 1983. The County of Schenectady moves for summary judgment pursuant to Rule 56 of the Federal Rule of Civil Procedure.

II. DISCUSSION

Rule 56(c) provides that the court may grant summary judgment where there are no genuine issues of material fact for trial. Fed.R.Civ.P. 56(c). If there are no genuine issues, the movant is entitled to judgment as a matter of law. When the movant meets this standard, the opposing party must present sufficient facts to demonstrate that there exists some genuine issues of

material fact in order to defeat the movant's motion for summary judgment. An issue is **genuine** if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986). The court must view the evidence in light most favorable to the party opposing the motion. See Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1187 (2d Cir. 1987).

When the opposing party bears the ultimate burden of proof on a particular issue, such party may defeat a properly supported summary judgment motion by producing specific facts which demonstrate a genuine issue of material fact on that issue. See Montana v. First Federal Savings and Loan Assoc. of Rochester, 869 F.2d 100, 103 (2d Cir. 1989); see also Thompson v. Gjivoje,

896 F.2d 716, 720 (2d Cir. 1990). Here, Plaintiff bears the ultimate burden of proof.

A. BACKGROUND

The theory under which the Plaintiff brings this cause of action is pursuant to Bivens, and therefore, before we delve into our analysis, it may be helpful to examine Bivens within the context of sectien 1983.

1. Section 1983

Historically, courts have stated that a party seeking to assert a claim under section 1983 must satisfy two elements. The Plaintiff must assert that the alleged unconstitutional act was undertaken by a person acting under color of state law, and that such conduct has deprived him of a right granted under the U.S. Constitution or federal law.

Gomez v. Toledo, 446 U.S. 635, 640 (1980).

Under section 1983, actions brought against municipalities carry an extra burden. The standard for municipality liability under section 1983 was enunciated in Monell. The Supreme Court in Monell stated that, under section 1983, Congress had not intended to expose municipalities to respondeat superior liability for all misdeeds by municipal employees. Id. at 691, 98 S.Ct at 2036. Rather, liability would attach to municipalities only when "the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id. at 694, 98 S.Ct.

at 2038 (emphasis added). Therefore, if a plaintiff must additionally show unlawful governmental policy or custom.

If the aggrieved party can satisfy all of the above elements, such party can recover damages against the state for their wrongful conduct. Section 1983 is, thus, a vehicle in which an individual may seek remedies for constitutional violations by the state.

An issue, then, arises as to whether violations by federal officials would be covered under section 1983. Clearly, they would not. "These claims are not covered by section 1983, because federal officials do not act under color of state law, but rather under color of federal law." Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees 15 (2d ed. 1991).

2. Claims under Bivens

The Supreme Court, in Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., as previously cited, addressed the issue of unconstitutional conduct by federal officials. In Bivens, the Plaintiff sued the agents of the Federal Bureau of Narcotics alleging that the agents, acting under color of federal authority, unlawfully searched his apartment and arrested him. Bivens, 403 U.S. at 389, 91 S.Ct. at 2001. The District Court dismissed the action on the ground that Plaintiff had failed to state a viable cause of action. Bivens v. 6 Unknown Named Agents of Federal Bureau of Narcotics, 276 F.Supp. 12 (E.D.N.Y. 1967). The decision was affirmed on appeal but was, ultimately, reversed by the Supreme Court. The Supreme Court opined that the Plaintiff

may recover directly under the Fourth Amendment in a suit against federal officials. Bivens, 403 U.S. at 397, 91 S.Ct. at 2005. The Bivens case, in essence, filled the void left by section 1983 for actions against federal entities since section 1983 did not provide for this coverage.

III. ANALYSIS

Under the above-mentioned Bivens theory, the Plaintiff in the instant action seeks to sue the County of Schenectady for violation of his Fifth, Sixth and Fourteenth Amendments without utilizing section 1983. Decisions of both the Supreme Court and the Second Circuit foreclose this course of action.

The Second Circuit has held that the availability of a section 1983 cause

of action against a municipality precluded any other direct claims against such municipality under the Fourteenth Amendment. Turpin v. Mailet, 591 F.2d 426, 427 (2d Cir. 1979); see also Lombard v. Board of Education, 784 F. Supp. 1029 (E.D.N.Y. 1992) (following Turpin). Turpin v. Mailet, as previously cited, is analogues to the instant case. The Plaintiff in Turpin attempted to circumvent the limitations of Monell by asserting a claim directly under the Fourteenth Amendment in an action against a state municipality. The Second Circuit, however, disallowed such an attempt. Turpin, 591 F.2d at 427. The Court stated that the plaintiff did not have a direct cause of action against the municipality under the Fourteenth Amendment, and that the plaintiff was limited to pursuing his damage remedies pursuant to section 1982

only. Id. at 426.

The Supreme Court, also in an analogues case, stated "express 'action at law' provided by [section] 1983 for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' provides the exclusive federal damages remedy for the violation of the rights guaranteed by [section] 1981 when the claim is pressed against a state actor. Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 735, 109 S. Ct. 2702, 2722 (1989) (emphasis added). Moreover, the Supreme Court recently noted that "the Courts of Appeals have unanimously rejected the contention...that the doctrine of respondeat superior is available against a municipal entity under a Bivens-type action implied directly under the Fourteenth Amendment." Jett, 491 U.S. at 735, 109 S. Ct. at 2722 (extensive

citations from six Courts of Appeals omitted). Therefore, an action brought against a municipality directly under the Fourteenth Amendment must be brought pursuant to 42 U.S.C. § 1983 and not under Bivens. The fact that Plaintiff cannot overcome the requirements of Monell is of no consequence.

In the present action, Plaintiff's only remedy is under section 1983 to recover against a state municipality, and therefore, a Bivens-type claim is not an appropriate way to proceed with the action.

Examination of the facts alleged in light most favorable to the Plaintiff reveal no issues of material fact in the instant action. The present motion turns strictly on a legal issue of whether Plaintiff can bring an action against a municipality under Bivens. It is this

Court's determination that he cannot for the reasons stated above.

Bivens reflects the proposition that persons deprived of their Constitutional rights by the government should have some form of redress. Bivens, 403 U.S. at 396-97, 91 S.Ct. at 2005. Such holding was only necessary because section 1983 did not apply to constitutional deprivations inflicted pursuant to federal authority. Because municipalities are subject to section 1983 liability, no other remedy is necessary against a municipality. In essence, Bivens is a judicially created counterpart to section 1983 for claims against federal officers. Accordingly, it would be incongruous and unprecedented for this court to allow Plaintiff to circumvent the limitations of section 1983 by asserting a Bivens claim.

II. Conclusion

The court hereby grants Defendant's motion for summary and dismisses Plaintiff's causes of action.

IT IS SO ORDERED

Dated at Binghamton, New York
September 28, 1993

/s/ Thomas J. McAvoy
Thomas J. McAvoy
Chief U.S. District Judge

Judgment in a Civil Case

UNITED STATES DISTRICT COURT
Northern District of New York

MICHAEL BATTAGLIA

V. 92-CV-1690

COUNTY OF SCHENECTADY

Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

in favor of defendant County of Schenectady and against plaintiff Michael Battaglia, and plaintiff's causes of action are DISMISSED, in accordance with the Memorandum Decision and Order of Chief Judge Thomas J. McAvoy, dated September 29, 1993.

September 30, 1993 GEORGE A. RAY
Clerk

/s/ Terry J. Mitchell
(By) Deputy Clerk

Supreme Court, U.S.
FILED
JUL 2 3 1994
OFFICE OF THE CLERK

No. 93-2066

In The

Supreme Court of the United States

October Term, 1994

MICHAEL BATTAGLIA,

Petitioner,

-against-

COUNTY OF SCHENECTADY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This action arises out of the criminal prosecution of Michael Battaglia. The involvement of the County of Schenectady was limited to the prosecution of Battaglia by the Schenectady County District Attorney's office and the confinement of Battaglia pursuant to a series of judicial orders of commitment.

On February 14, 1989, Battaglia was indicted for various crimes associated with a burglary, but this indictment was dismissed without prejudice. Thereafter, pursuant to New York Criminal Procedure Law 30.30, Battaglia was reindicted on all counts on February 22, 1989. The arraignment was scheduled for February 24, 1989, but the petitioner did not appear for the arraignment because he was serving a sentence in another jail on an unrelated charge. The People announced they were ready for trial and County Court rescheduled the arraignment for March 3, 1989.

Thereafter, petitioner's counsel moved to dismiss the indictment on the ground that Battaglia was deprived of his right to a speedy trial pursuant to New York Criminal Procedure Law 30.30. County Court denied the motion, determining that counsel's failure to object to the rescheduling of the arraignment constituted a consent to the adjournment and therefore the arraignment was timely.

Battaglia was convicted on all counts and thereafter appealed the County Court's denial of his motion to dismiss. By decision dated November 12, 1992, the Appellate Division of New York Supreme Court reversed

the decision of the County Court holding that the petitioner's failure to object to the adjournment of the arraignment did not constitute a consent. The Appellate Division, finding that petitioner was deprived of his **statutory** right to a speedy trial under New York Criminal Procedure Law 30.30, reversed his conviction. *People* v. *Battaglia*, 187 A.D.2d 808 (3rd Dept. 1992). Battaglia thereafter commenced this action alleging violations of his civil rights.

In his rambling statement of the case, petitioner misstates or omits facts bearing on whether this Court should grant *certiorari*. Petitioner contends at page 18 that the accusatory instrument which was the basis of his conviction was time barred. However, there is absolutely no evidence, nor can petitioner point to any, that the commitment orders issued by the various judges were in any manner illegal or erroneous. Battaglia also contends at page 20 that his prison term was "all for naught"; however, petitioner never moved for a stay of judgment pending his appeal pursuant to New York Criminal Procedure Law 460.50, which motion may have prevented him from serving his jail sentence pending the determination of his appeal. Petitioner also contends that his Sixth Amendment speedy trial rights were violated. However, as indicated by the Appellate Division decision reversing his conviction, Battaglia's **statutory** speedy trial rights were violated, not his constitutional speedy trial rights.

Petitioner also states at page 24 that respondent argued below that District Attorneys were not county officers and therefore the County is not liable for any acts committed by a District Attorney. This is simply inaccurate. Respondent contended below, and does so here, that

a District Attorney, **when he prosecutes a crime**, is acting under color of State Law and as a State Officer and therefore the County is not liable when he acts in this capacity. Petitioner also misstates relevant case law to support his petition, and these misstatements are addressed in the subsequent portions of this brief.

ARGUMENT

SECTION I

THE SECOND CIRCUIT'S DECISION IN *BAEZ V. HENNESSY* IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *PEMBAUR V. CITY OF CINCINNATI.*

Petitioner labors under the misconception that the Second Circuit's decision in *Baez v. Hennessy*, 853 F.2d 73 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014, is in conflict with this Court's holding in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). As relevant to this petition, *Pembaur* holds that a municipality may be found liable for the acts of its policymakers, but in order to be liable the official must be responsible for establishing final government policy. *Pembaur v. City of Cincinnati*, 475 U.S. at 481-483. Whether an official is responsible for establishing a municipality's policy and thus making that municipality liable for a §1983 claim is determined by a review of relevant State law. *Id.* at 483; *see also, City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). This Court noted in *Pembaur* that great deference is to be accorded the interpretation and application of State law by the Courts of Appeals. *Pembaur v. City of Cincinnati*, 475 U.S. at 484, n.13; *see also, United*

States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 815, n.12 (1984).

Deferring to the Court of Appeals' determination with respect to the interpretation of Ohio law, this Court in *Pembaur* found that **pursuant to Ohio law** the County prosecutor could establish County policy under appropriate circumstances and thus the County could be held liable for a §1983 violation. *Pembaur v. City of Cincinnati*, 475 U.S. at 484-485. The key question here is whether **under New York law** a District Attorney when prosecuting a crime acts as a County official sufficient to hold the County liable for an alleged §1983 violation.

This question has already been answered by the Second Circuit Court of Appeals. In an exhaustive analysis of New York Court decisions on this matter, the Second Circuit declared that "[w]hen prosecuting a criminal matter, a district attorney in New York State, acting in a quasi-judicial capacity, represents the State not the County." *Baez v. Hennessy, supra*, at 77. In reaching this conclusion, the Second Circuit relied on numerous New York court decisions as well as the constitutional and legislative history of the office of the District Attorney. Recognizing the unique role of the New York District Attorney in prosecuting criminal matters, the Second Circuit noted that New York State has retained numerous powers over the District Attorney, which no County can counteract. *See also, Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935) ("the district attorney in each county has been regarded as a state officer performing a state function").

In its analysis the Second Circuit was not unmindful of this Court's decision in *Pembaur.* In *Pembaur* the Second Circuit noted that this Court and the lower courts relied on an Ohio statute which specifically authorized a county prosecutor to instruct deputy sheriffs. *See, Ohio Rev. Code Ann.* §309.09(A) (1979). No similar statute exists in New York and in fact "controlling law [in New York] places limits on the County's authority over the district attorney". *Id.* at 77. Thus, unlike Ohio, a County in New York may not be held responsible for the actions of the District Attorney when he prosecutes a crime. *Id.* at 77.

Petitioner's perception of a conflict between *Pembaur* and *Baez* is likely based on his misreading of the holding in *Baez.* Petitioner views *Baez* as holding that a "District Attorney of any County [is] a State officer rather than a County officer." [page 44 of petition]. *Baez,* however, does not stand for this proposition; rather, *Baez* stands for the proposition that the District Attorney, **when he acts in a prosecutional role**, represents the State and not the County, and therefore the County cannot be held liable when he acts in this capacity.

Plaintiff's inability to grasp the concept that the District Attorney acts for different entities depending on what role he performs is further indicated by the Second Circuit's recent decision in *Ying Jing Gan v. City of New York,* 996 F.2d 522 (1993). In *Ying Jing Gan,* the Second Circuit reiterated that a District Attorney represents the State when prosecuting a crime (and therefore the County cannot be held liable for a §1983 claim), but may represent a municipality when discharging administrative functions. *Id.* at 536. Here, petitioner alleges that he was

wrongfully prosecuted, not that some administrative duty was improperly carried out.

Petitioner's comparison of New York and Ohio law with regard to budgeting and residency of District Attorneys is simply irrelevant to the issues in his petition. As indicated above, the Ohio statute in *Pembaur* gave the county prosecutor final decision-making authority by authorizing him to give legal advice to county officers, including Sheriffs, in matters connected with their official duties. *See, Ohio Rev Code Ann.* §309.09(A) (1979). Petitioner cannot point to any similar New York statute, because none exists, and the Second Circuit in *Baez* specifically held that the County cannot be held responsible for the actions of the District Attorney when he prosecutes a crime. In addition, the conduct of the county prosecutor under scrutiny in Ohio was not prosecutorial whereas here the conduct at issue is entirely prosecutorial. On this basis, this Court should not hear this petition as *Baez* and *Pembaur* are not in conflict.

SECTION II

THE DECISION OF THE DISTRICT COURT AND CIRCUIT COURT IN THIS MATTER WITH REGARD TO THE ROLE OF A PROSECUTOR IN NEW YORK STATE IS NOT IN CONFLICT WITH THE INTERPRETATIONS OF NEW YORK STATE COURTS.

New York Courts have expressly held that the District Attorney represents the State when prosecuting criminal matters and the County may not be held responsible when he acts in this capacity. *See, Davis Construction Corp. v. County of Suffolk,* 112 Misc.2d 652 (Supreme

Court, Suffolk County 1987), *aff'd*, 95 A.D.2d 819, *Brenner v. County of Rockland*, 92 Misc.2d 833 (Supreme Court, Rockland County 1978), *aff'd*, 67 A.D.2d 901; *Zimmerman v. City of New York*, 52 Misc.2d 797 (Supreme Court, New York County 1966). Although a District Attorney receives his budget from the County and is required to be a resident of the County he serves, the local government cannot control the manner in which the District Attorney performs his constitutional and statutory duties, which includes prosecuting crime. *See, Davis Construction Corp. v. County of Suffolk, supra*, at 663-665. Petitioner points to no New York statute, nor does one exist, in which the local government controls the District Attorney in performance of his prosecutorial duties. Both the District Court and the Second Circuit were absolutely in line with New York court decisions on this issue, and petitioner has once again misconstrued relevant case law to persuade this Court to hear his petition.

Petitioner relies heavily on the cases of *Fisher v. State of New York*, 10 N.Y.2d 60 (1961), and *Whitmore v. State of New York*, 55 A.D.2d 745 (Third Dept. 1971), *lv. denied*, 42 N.Y.2d 810. Although *Fisher* and *Whitmore* were civil suits based on certain alleged torts of the District Attorney, these cases only hold that the State cannot be held responsible for the actions of the District Attorney under a theory of *respondeat superior*. These cases do not state that the District Attorney acts for the County when prosecuting a crime, thereby making the County liable for any alleged §1983 violations. Furthermore, as indicated in Section IV, *infra*, Federal and State Courts have held that the County cannot be held liable for the prosecutorial acts

of its District Attorney's office because as a quasi-judicial officer he is immune from liability.

SECTION III

PETITIONER'S COMPLAINT DOES NOT PLEAD A VIABLE CAUSE OF ACTION UNDER ANY THEORY.

Petitioner contends that his complaint pleads a viable cause of action under either *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) or §1983 of the Civil Rights Act. It should be noted that petitioner has never made up his mind as to what theory he bases his claim on. Although petitioner apparently pled a §1983 cause of action in his complaint, at oral argument in District Court he indicated that this was not a §1983 action but rather a *Bivens* action. Now petitioner contends that he can bring this action under either §1983 or *Bivens*.

As both lower courts indicated, petitioner cannot plead a cause of action under *Bivens* because *Bivens* relates only to the actions of **federal** actors, and the County of Schenectady is clearly not a Federal actor. *See also, Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989).

Petitioner also fails to plead a §1983 cause of action because, as indicated in Sections 1 and 2 of this brief, the District Attorney in New York State is not acting as a County official when prosecuting a crime and therefore the County cannot be liable for his actions. Furthermore, petitioner has failed to plead any custom, practice or policy of the County of Schenectady, as is required in a §1983

claim. *See, Monell v. Department of Social Services,* 436 U.S. 658 (1978).

SECTION IV

THE DOCTRINE OF DERIVATIVE IMMUNITY IS APPLICABLE TO THIS CASE.

Petitioner contends that the County cannot derive immunity from the acts of its District Attorney. This statement is simply false. As New York and Federal Courts have held, a County cannot be held liable for the prosecutorial acts of its District Attorney's office, which are part of its official conduct in a criminal prosecution. *See, Imbler v. Pachtman,* 424 U.S. 409 (1976); *Yaselli v. Goff,* 12 F.2d 396 (Second Cir., 1926), *aff'd,* 275 U.S. 502 (1926); *Arteaga v. State of New York,* 72 N.Y.2d 212, 217 (1988); *Covillion v. Town of New Windsor,* 123 A.D.2d 763, 764 (Second Dept., 1986); *Calderon v. County of Westchester,* 111 A.D.2d 208 (Second Dept., 1985); *Johnson v. Town of Colonie,* 102 A.D.2d 925, 926 (Third Dept., 1984); *Schanbarger v. Kellogg,* 35 A.D.2d 902 (Fourth Dept., 1970), *appeal dismissed,* 29 N.Y.2d 649, *cert. denied* 405 U.S. 919.

Plaintiff refers to *Owen v. City of Independence,* 445 U.S. 622 (1980) and *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), to support his proposition. *Harlow,* which involved the question of whether aides to the President are entitled to good faith immunity, involved a *Bivens'* action, which is not the case here, and specifically did not address the issue of liability of a municipality for acts of a District Attorney. In *Owen,* a police chief was dismissed by the City, City Manager and members of the City

Council, who clearly are officials to implement a municipality's custom or policy. In *Owen*, the Court specifically said that the public should only be forced to bear the costs of injury inflicted by those whose acts may fairly be said to represent official policy. Here, as indicated above, the County may not be held liable for the District Attorney's actions when he prosecutes crime.

CONCLUSION

FOR THE REASONS STATED ABOVE, AND ON THE BASIS OF THE FURTHER DISCUSSION OF THE FACTS AND CASE LAW SET FORTH IN THE OPINIONS OF BOTH COURTS BELOW, THE PETITION SHOULD BE DENIED.

Dated: July 22, 1994

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